

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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JAN 17 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
TELEPHONE COMPANY-)
CABLE TELEVISION)
Cross-Ownership Rules)
Section 63.54-63.58)
)
and)
)
Amendments of Parts 32, 36,)
61, 64, and 69 of the)
Commission's Rules to)
Establish and Implement)
Regulatory Procedures for)
Video Dialtone Service)

CC Docket No. 87-266

RM-8221

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REPLY COMMENTS OF HOME BOX OFFICE IN
THE THIRD NOTICE OF PROPOSED RULEMAKING

HOME BOX OFFICE

Michael H. Hammer
Thomas Jones

WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384
(202) 328-8000

Its Attorneys

January 17, 1995

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**REPLY COMMENTS OF HOME BOX OFFICE IN
THE THIRD NOTICE OF PROPOSED RULEMAKING**

Home Box Office ("HBO"), a Division of Time Warner Entertainment Company, L.P., hereby submits these brief Reply Comments in the above-captioned proceeding.

I. CHANNEL SHARING

As HBO stated in its comments, the Commission must ensure that video dialtone ("VDT") providers offer adequate capacity to accommodate packages of video programming that are competitive with those of other multichannel video programmers. Channel sharing arrangements have been proposed as one way to provide enough capacity for competitive programming packages. Moreover, GTE's statement that digital set top boxes will be, at least initially, too expensive for widespread usage¹ will no doubt

¹ See Comments of GTE at 3-4 ("it now appears that widespread use of set top boxes with digital capabilities in the (continued...)

focus even more attention on channel sharing as a possible short term solution to analog channel capacity shortages. HBO wishes therefore to reiterate its concerns about channel sharing.

The Commission should ensure that in any channel sharing arrangement, programmers retain the right to negotiate all of the terms and conditions of the use of their programming.² The Commission should also ensure that channel sharing arrangements do not result in discrimination against certain programmers. Such unfair treatment could result, for example, from telcos discriminating against programmers that refuse to participate in channel sharing or from the exclusion of certain classes of programming from participation in channel sharing. These assurances should apply broadly in any channel sharing context, and the Commission should therefore adopt the safeguards enumerated in HBO's comments.³

¹(...continued)
initial phases of GTE's video dialtone deployment is not economically feasible") (emphasis in original).

² It is crucially important, for example, that the Commission allow programmers to protect the security of their signals. The Commission should not, therefore, rely on the purported costs of interdiction described in Bell Atlantic's channel sharing proposal to mandate that VDT signals operate in the clear. See Comments of Bell Atlantic at 11-13. The Commission should instead permit programmers and VDT providers to negotiate among themselves whether signals will be encrypted.

³ See Comments Of Home Box Office In The Third Notice Of Proposed Rulemaking at 10-11.

II. PREFERENTIAL TREATMENT

Several parties advocated that the Commission mandate carriage by VDT operators of certain classes of program services, or, in the alternative, permit preferential treatment of programmers by telcos.⁴ Preferential treatment, whether mandatory or permissive, would inevitably result in the exclusion of certain non-privileged programmers from access to analog channels in violation of the telcos' Title II obligation to offer like service to all who make a "reasonable request therefor."⁵ Preferential access also would result in the subsidization of preferred programmers by non-preferred programmers and would therefore violate the Title II requirement that charges for common carrier services be "just and reasonable."⁶ Thus, preferential access would alter the VDT concept in such a fundamental manner as to make it virtually unrecognizable.

This is particularly true in light of the wide array of parties seeking preferential treatment. The Association of America's Public Television Stations requests preference for

⁴ Several parties have asked the Commission to permit VDT providers to choose the programming carried on their shared channels. HBO believes that any such telco-administered preferential access scheme violates the prohibition against VDT providers engaging in programming. Moreover, it would be inappropriate for the Commission to grant such authority in this proceeding in light of the fact that the Commission on January 12, 1995, initiated a new NPRM to address that very issue. See FCC News Release Adopting NPRM To Examine Telephone Companies' Provision Of Video Programming (rel. January 12, 1995).

⁵ See 47 U.S.C. § 201(a).

⁶ See 47 U.S.C. § 201(b).

public broadcasters;⁷ several consumer groups, filing jointly, similarly urge the same for "non-profit and governmental entities providing noncommercial services to the public;"⁸ the Community Broadcasters Association wants small broadcasters to enjoy preferential access⁹ while the PEG Access Coalition¹⁰ and NATOA¹¹ make the case for PEG channels; and some telcos have indicated plans to grant preferential access exclusively to broadcasters. The aggregate effect of these proposals could literally overwhelm VDT systems. If half or more of a VDT system's capacity is devoted to pre-selected preferred programmers, VDT can no longer be fairly characterized as a common-carrier service where programmers have first-come, first-served, nondiscriminatory access to carriage.

Moreover, neither the Commission nor the telcos should become mired in the process of deciding which of these proposed beneficiaries "deserves" special treatment. Any Commission

⁷ See Comments Of The Association Of America's Public Television Stations.

⁸ See Comments Of Center For Media Education, Consumer Federation Of America, Media Access Project And People For The American Way On The Third Further Notice Of Proposed Rulemaking at 7.

⁹ See Comments Of The Community Broadcasters Association.

¹⁰ See Comments Of The Alliance For Community Media And The Office Of Communication Of The United Church Of Christ (Collectively, The "Peg Access Coalition").

¹¹ See Comments Of The National Association Of Telecommunications Officers And Advisors And The City Of New York at 4-7.

choice would almost certainly not pass First Amendment muster while any telco choice would violate the Communications Act as described. Accordingly, HBO urges the Commission to remain faithful to the guiding principle of the common carrier VDT model: the "obligation to provide service indifferently to all comers."¹²

CONCLUSION

For these Reasons, HBO respectfully recommends that the Commission adopt VDT rules consistent with the recommendations contained herein.

Respectfully submitted,
HOME BOX OFFICE


Michael H. Hammer
Thomas Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384
(202) 328-8000

Its Attorneys

January 17, 1995

¹² See National Cable Television Ass'n v. FCC, 33 F.3d 66, 75 (D.C. Cir. 1994).

CERTIFICATE OF SERVICE

I, Thomas Jones, do hereby certify that on this 17th day of January, 1995, copies of the foregoing "Reply Comments of Home Box Office in the Third Notice of Proposed Rulemaking" were delivered by first-class, postage pre-paid mail to the following parties:

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, DC 20554

Commissioner Rachelle Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, DC 20554

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, DC 20554

ITS, Inc.
1919 M Street, N.W.
Room 246
Washington, DC 20554

James Keegan, Chief
Domestic Facilities Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W. - Room 6010
Washington, DC 20554

William Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, DC 20554

Peggy Reitzel
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, DC 20554

Donna Lampert
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 545
Washington, DC 20554

Gregory Lipscomb
Policy and Program Planning Division
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, DC 20554

Kathie Levitz, Deputy Chief
Common Carrier Bureau
Federal Communications Commissions
1919 M Street, N.W.
Room 500
Washington, DC 20554

A. Richard Metzger, Jr., Esq.
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, DC 20554

Carol Matthey, Deputy Chief
Policy and Program Planning Division
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, DC 20554

Gary Phillips
Policy and Program Planning Division
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, DC 20554

Commissioner James H. Quello
Federal Communication Commission
1919 M Street, NW
Room 802
Washington, DC 20554

Alonzo Matthews, Manager
General Services Administration
City and County of Denver
17th Floor
303 West Colfax
Denver, CO 80204

Michael E. Glover
Betsy L. Anderson
1710 H Street, N.W., 8th Floor
Washington, DC 20006

James P. Tuthill
Lucille M. Mates
140 New Montgomery Street, Rm. 1526
San Francisco, CA 94105

Rodney L. Joyce
Ginsburg, Feldman and Bress
1250 Connecticut Avenue, N.W.
Washington, DC 20036

Ronald G. Choura
Policy and Planning Division
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909

James Schlichting, Chief
Policy and Program Planning Division
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, DC 20554

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Todd Silbergeld
Policy and Program Planning Division
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, DC 20554

Kathleen Wallman, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, DC 20554

Henry Rivera
Ginsburg, Feldman and Bress
1250 Connecticut Avenue, N.W.
Washington, DC 20036

Norman M. Sinel
Stephanie M. Phillipps
William E. Cook, Jr.
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, DC 20036

Lisa M. Zaina, General Counsel
OPASTCO
21 Dupont Circle, N.W.
Suite 700
Washington, DC 20036

Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, DC 20036

Larry A. Peck
Michael S. Pabian
Pamela J. Andrews
Room 4H74
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025

Robert M. Lynch
Paula J. Fulks
175 E. Houston
Room 1212
San Antonio, TX 78217

Nicholas W. Allard
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, DC 20004-2505

Deborah L. Ortega, President of the City Council
Hiawatha Davis, Jr.
City Councilman & Chair Economic
Development Committee
City and County of Denver
City and County Building
Denver, CO 80202

Andrew D. Lipman
Gene DeJordy
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, DC 20007

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Avenue, N.W.
Washington, DC 20036

Barbara N. McLennan,
Staff Vice President/Technology Policy
George A. Hanover Staff Vice Pres./Engineering
Consumer Electronics Group
Electronic Industries Association
2001 Pennsylvania Avenue, N.W.
Washington, DC 20006

M. Robert Sutherland
Michael A. Tanner
Theodore R. Kingsley
4300 Southern Bell Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375

Kim Koonz Bayliss
Vice President Gov't Relations
United Video
One Massachusetts Avenue, N.W.
3rd Floor
Washington, DC 20001

Gregory R. Vawter
Waycross Community Television
2086 Way Cross Road
Forest Park, OH 45240

Paul Glist
John Davidson Thomas
John D. Seiver
T. Scott Thompson
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006

Charla M. Rath
Kevin McGilly
Freedom Technologies, Inc.
1100 New York Avenue
Suite 650 East
Washington, DC 20005

Jay C. Keithley
1850 M Street, N.W.
Suite 1100
Washington, DC 20036

Paul Rodgers, General Counsel
Charles D. Gray, Asst. General Counsel
James Bradford Ramsay, Dep. Asst. Gen.
Counsel
National Association of Regulatory
Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, DC 20044

Jeffrey S. Hops
Director, Government Relations
Allance for Community Media
666 11th Street, N.W., Suite 806
Washington, DC 20001

Bradley Stillman
Consumer Federation of America
1414 16th Street, N.W.
Washington, DC 20036

Jill Lesser
Civic Media Project of People
For the American Way and
Media Access Project
2000 M Street, N.W.
Washington, DC 20036

Robert B. McKenna
U.S. West Communications, Inc.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036

Herbert E. Marks
Jonathan Jacob Nadler
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Washington, DC 20044

Frank W. Lloyd
Kecia Boney
Mintz Levin Cohn Ferris Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004

Mark C. Rosenblum
Robert J. McKee
Room 3244J1
295 North Maple Avenue
Basking Ridge, NJ 07920

Daryl L. Avery, General Counsel
Josephine S. Simmons, Staff Counsel
Public Service Commission of the District
of Columbia
450 Fifth Street, N.W.
Washington, DC 20001

Barry S. Abrams
Campbell L. Ayling
Robert A. Lewis
120 Bloomingdale Road
WhitePlains, NY 10605

Angela Campbell
Ilene Penn
Institute for Public Representation
Georgetown University Law Center
400 New Jersey Avenue, N.W.
Washington, DC 20001

Andrew Jay Schwartzman
Media Access Project
2000 M Street, N.W.
Washington, DC 20036

Janice Obuchowski
Halprin, Temple & Goodman
1100 New York Avenue
Suite 650 East
Washington, DC 20005

Sherwin Grossman, President
Community Broadcasters Association
c/o Irwin & Campbell, P.C.
1320 18th Street, N.W., Suite 400
Washington, DC 20036

Thomas K. Steel, Jr.
Vice President and General Counsel
New England Cable Television Association
100 Grandview Road, Suite 201
Braintree, MA 02184

Alan J. Gardner
Jerry Yanowitz
Jeffrey Sinsheimer
California Cable Television Association
4341 Piedmont Avenue
P.O. Box 11080
Oakland, CA 94611

Lawrence W. Secrest, III
Philip V. Permut
Peter D. Ross
Rosemary C. Harold
Wiley Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006

Jonathan D. Blake
John Duffy
Alane C. Weixel
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044-7566

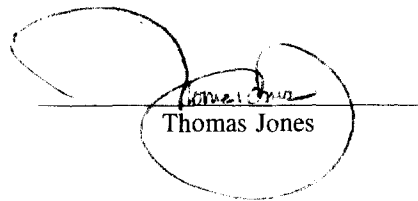
Craig T. Smith
P.O. Box 11315
Kansas City, MO 64112

Marilyn Mohrman-Gillis, General Counsel
Lonna Thompson
The Association of America's Public
Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20006

Jonathan D. Blake
John Duffy
Alane C. Weixel
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044-7566

Craig T. Smith
P.O. Box 11315
Kansas City, MO 64112

Marilyn Mohrman-Gillis, General Counsel
Lonna Thompson
The Association of America's Public
Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20006



Thomas Jones